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No. 80-1647

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DONALD T. REGAN, SECRETARY
DEPARTMENT OF TREASURY, *Petitioner,*
v.
COMMONWEALTH OF PUERTO RICO, *Respondent.*

DONALD T. REGAN, SECRETARY
DEPARTMENT OF TREASURY, *Petitioner,*
v.
VIRGIN ISLANDS, *Respondent.*

RESPONDENTS' BRIEF IN RESPONSE TO CROSS-PETITION

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RESPONDENTS' BRIEF IN RESPONSE TO CROSS-PETITION

Petitioner recognizes that the petition in the captioned case is, in effect, a cross-petition for *certiorari* in *Commonwealth of Puerto Rico* v. *Regan*, No. 80-1252 and *Virgin Islands* v. *Regan*, No. 80-1253. Petn. at 1, 14-15. Although respondents are prepared to show that there is no merit in the Secretary's position on the questions set forth in his cross-petition, the Commonwealth of Puerto Rico and the Virgin Islands do not oppose Supreme Court review of those questions. The fact that the Secretary felt compelled to file a cross-petition on issues not considered by the Court of Appeals only serves to highlight the overall importance of these cases and to provide additional reason for granting the original petitions for *certiorari* filed by Puerto Rico and the Virgin Islands. Certainly, nothing in the Secretary's cross-petition is in any way inconsistent with the reasons for granting the writ advanced by Puerto Rico and the Virgin Islands.

Though respondents are content to await the briefs on the merits to respond to most of petitioner's arguments, we do wish to demonstrate now the frailty of the threshold arguments lest this Court be lulled into believing that is lacks jurisdiction over these cases.

a. Contrary to the Secretary's argument, the doctrine of sovereign immunity does not bar these actions. The October 21, 1976 amendments to the Administrative Procedure Act explicitly waive that defense in actions for declaratory and injunctive relief and mandamus. 5 U.S.C. §702, *as amended*. H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. 1, *reprinted in* [1976] U.S. Code Cong. & Ad. News 6121. (Section 702 was amended "so as to remove the defense of sovereign immunity as a bar to judicial review of Federal administrative action otherwise subject to judicial review.") *See Sheehan* v. *Army and Air Force Exchange Service*, 619 F.2d 1132, 1139 (5th Cir. 1980). And the waiver occasioned by the 1976 amendments is applicable to litigation pending at the time of their enactment. *Legal Aid Society of Alameda County* v. *Brennan*, 608 F.2d 1319, 1332 (9th Cir. 1979), *cert. denied*, 447 U.S. 921 (1980); *Driver* v. *Helms*, 456 F. Supp. 496, 497, n. 1 (D.R.I. 1978). In addition, these cases fall within the well-established exception that an action against an officer of the federal government is not barred by sovereign immunity if the officer's challenged acts are *ultra vires*. *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Dugan* v. *Rank*, 372 U.S. 609 (1963); *Eastern Kentucky Welfare Rights Organization* v. *Simon*, 506 F.2d 1278 (D.C. Cir. 1974), *vacated on other grounds*, 426 U.S. 26 (1976). Contrary to the Secretary's assertion, the relief sought by respondents will not require an affirmative act of the sovereign or the disposition of unquestionably sovereign

property, but only that the Secretary cease the unauthorized withholding of funds which Congress has appropriated and ordered to be covered into the treasuries of Puerto Rico and the Virgin Islands. *See City of Santa Clara* v. *Andrus*, 572 F.2d 660, 679 (9th Cir. 1978), *cert. denied*, 439 U.S. 859 (1979); *Schafly* v. *Volpe*, 495 F.2d 273, 280 (7th Cir. 1974); *National Council of Community Mental Health Centers* v. *Weinberger*, 361 F. Supp. 897, 900 (D.D.C. 1973); *Pennsylvania* v. *Lynn*, 362 F. Supp. 1363, 1368 (D.D.C. 1973), *rev'd on other grounds*, 501 F.2d 848 (D.C. Cir. 1974).

Furthermore, as the district court correctly concluded, the claims in these cases fall squarely within the traditional principles governing actions for mandamus. Indeed, this Court has itself, in a long line of cases, specifically affirmed the appropriateness of mandamus relief to compel federal officers to pay monies out of the public treasury, where the duty was clear and ministerial. *E.g., Houston* v. *Ormes*, 252 U.S. 469, 472 (1920); *Minnesota* v. *Hitchcock*, 185 U.S. 373, 386 (1902). The Secretary's cross-petition suggests that this line of cases was overruled by the dictum found in a footnote in *Larson* v. *Domestic and Foreign Commerce Corp., supra*, 337 U.S. at 692, n. 11, thereby implying that sovereign immunity is applicable whenever a court order could affect the disposition of sovereign property even if the government official is acting in violation of a mandatory statutory duty. While this Court has not squarely addressed this issue, *see Train* v. *Campaign Clean Water, Inc.*, 420 U.S. 136, 138 (1975), at least one court of appeals has expressed the view that it is "inconceivable that the Court would take such a step without mentioning the rule of those cases or the cases themselves, and

particularly that it would take such sweeping action in a footnote to an opinion which did not involve the point." *Clackamas County* v. *McKay*, 219 F.2d 479, 493 (D.C. Cir. 1954), *vacated as moot*, 349 U.S. 909 (1955). *See also Vishnevsky* v. *United States*, 581 F.2d 1249, 1255 (7th Cir. 1978).

The claims in these cases are based on explicit statutory provisions mandating the payment into the treasuries of the Commonwealth of Puerto Rico and the Virgin Islands of "all taxes collected under the internal revenue laws of the United States" on articles produced in the respective islands and transported to the United States, and, in the case of the Virgin Islands, of "[t]he proceeds of customs duties . . . less the costs of collecting all of said duties." The language of the statutes relied upon is peremptory. No issues of fact or matters of policy are involved. If the statutes embrace the disputed taxes and duties, the Secretary is under a clear duty to deposit the sums collected in the treasuries of Puerto Rico and the Virgin Islands, and he never has suggested otherwise. Only if sovereign immunity bars all suits for mandamus affecting the disposition of federal funds can the claims in this case be deemed jurisdictionally deficient.

b. Nor is there any merit to the Secretary's argument that the Declaratory Judgment Act, 28 U.S.C. §2201, bars these actions. It is well settled that the Declaratory Judgment Act is coterminous with the Anti-Injunction Act, 26 U.S.C. §7421(a), which proscribes suits for the purpose of restraining the assessment or collection of any tax. *Eastern Kentucky Welfare Rights Organization* v. *Simon, supra*, 506 F.2d at 1284-1285; *McGlotten* v. *Connally*, 338 F. Supp. 448, 453 (D.D.C.

1972) (three-judge court). The instant actions clearly are not barred by the Anti-Injunction Act, and hence not by the Declaratory Judgment Act, because they have nothing to do with restraining the assessment or collection of taxes. The Secretary already has assessed and collected the taxes which are at issue. The only questions presented are whether 48 U.S.C. §734 and section 28 of the Revised Organic Act of the Virgin Islands, 68 Stat. 497, require that the taxes which have been assessed and collected be covered into the treasuries of Puerto Rico and the Virgin Islands.

CONCLUSION

The petitions for *certiorari* in Nos. 80-1252 and 80-1253 and the cross-petition in No. 80-1647 should be granted, and writs of *certiorari* should issue to review the judgments and opinions of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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April 17, 1981

CERTIFICATE OF SERVICE

I, Michael J. Henke, attorney for respondent and a member of the Bar of this Court, certify that on this 17th day of April, 1981, the foregoing Brief in Response to Cross-Petition has been served upon petitioner by hand-delivering three copies thereof to David English Carmack, Department of Justice, Washington, D.C., attorney for petitioner, and by mailing three copies, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served have been served.

MICHAEL J. HENKE

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